Filed 8/31/12 P. v. Gilliam CA2/5

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE, Plaintiff and Respondent, v. BILLY D. GILLIAM, Defendant and Appellant.	B225738 (Los Angeles County Super. Ct. No. BA344243)

APPEAL from a judgment of the Superior Court of Los Angeles County. Curtis B. Rappe, Judge. Affirmed.

Barbara A. Smith, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Paul M. Roadarmel, Jr., and Margaret E. Maxwell, Deputy Attorneys General, for Plaintiff and Respondent.

Appellant Billy Gilliam was convicted, following a jury trial, of two counts of being a felon in possession of a firearm in violation of Penal Code section 12021, subdivision (a)(1).[1] The jury found true the allegations that both offenses were committed for the benefit of a criminal street gang within the meaning of section 186.22, subdivision (b)(1)(A). The trial court found true the allegations that appellant had suffered two prior convictions within the meaning of section 667, subdivision (a) and the "Three Strikes" law (§§ 667, subds. (b)-(i) and 1170.12). The trial court sentenced appellant to 76 years to life in state prison, consisting of 25 years to life on count 1 pursuant to the Three Strikes law, plus a three-year term for the gang enhancement plus two five-year terms pursuant to section 667, subdivision (a), plus those same terms for count 2.

Appellant appeals from the judgment of conviction, contending that there is insufficient evidence to support the gang enhancements. He further contends that the trial court erred in declining to modify CALCRIM No. 1401 and in imposing sentence consecutively for his two convictions. Appellant also contends that the lower courts erred in denying his motions to quash/traverse the search warrant for his apartment and his motion to suppress evidence. We affirm the judgment of conviction.

Facts

As part of an investigation into a 2004 armored car robbery and murder, Los Angeles Police Department ("LAPD") Detective Joseph O'Donnell obtained a wiretap order authorizing the interception of calls made on various telephone numbers belonging to Kevin Maddox, a leader of the Seven-Four Hoover gang.[2] Thousands of calls to and from Maddox were intercepted.

---

[1] All further statutory references are to the Penal Code unless otherwise indicated.

[2] LAPD Officer Nicholas Hartman, an expert on the gang, opined that Maddox was the "president" of the gang.

As relevant here, three calls were intercepted between Maddox and appellant. These calls occurred during June and July 2008. During these calls, the two men discussed ammunition and firearms. Maddox indicated that he was seeking weapons and ammunition for gang members, and was looking to appellant for assistance. Appellant provided some information about individuals who might be able to supply weapons and ammunition. Appellant indicated that he had a nine-millimeter weapon, and that he himself was looking for ammunition.

Law enforcement officials obtained about 18 search warrants based on all of Maddox's intercepted calls, including a search warrant for appellant's residence and an arrest warrant for appellant.

The search of appellant's residence uncovered a .30-30 caliber Winchester rifle, a nine-millimeter handgun loaded (ineffectively) with a .32 caliber cartridge and a loose .38 caliber cartridge. They also found gang-related clothing, letters and photographs. The letters were from two other Hoover gang members, and used gang terminology. One key piece of clothing was a hat with the emblem "SF" on it, for the San Francisco Giants, which Officer Hartman believed had gang significance because the SF initials were also used by the Seven-Four Hoover gang. There was a photograph of appellant wearing the hat. There was a photo album with artwork of gang symbols and men and women dressed in orange and blue gang colors making Hoover gang signs and displaying gang tattoos.

At trial, the prosecution introduced evidence of a post-arrest recorded telephone call, during which appellant admitted that he possessed the guns found by police. In addition, the prosecution introduced evidence that appellant's DNA was present on the handgun. Not enough DNA was recovered from the rifle for an accurate analysis.

Also at trial, the prosecution introduced evidence to show that appellant was a member of the Seven-Four Hoover gang at the time of the calls. Officer Hartman testified as an expert on the Hoover gang, and opined that appellant was a member of that gang. His opinion was based on appellant's admission of gang membership to Officer Hartman in 2007, and to other officers before that time. The continued presence of

extensive gang tattoos on appellant's body supported Officer Hartman's opinion that appellant was an active gang member.[3] The gang-related items found in appellant's room also supported Officer Hartman's opinion.

Officer Hartman also offered testimony about the structure of the Hoover gang, its various subsets including the Seven-Four subset, the gang's rivals, allies, and territory, and gang activities. He testified that the gang's primary activities included murders, robberies, assaults with firearms, sales of crack cocaine and possession for sale of crack cocaine. Proceeds from the crimes were used to buy guns, purchase more cocaine and provide bail money. Officer Hartman also testified about specific offenses involving attempted murders and robberies in 2006 and 2007.

The prosecutor's theory at trial was that appellant was the "go-to guy" for firearms and ammunition for his gang, and possessed the two firearms found in his bedroom for purposes of either supplying them to other gang members or protecting himself while he engaged in his gang role of acquiring or facilitating the acquisition of guns and ammunition for his gang. To support this theory, the prosecutor offered the contents of three telephone calls between appellant and Maddox.

On June 10, Maddox told appellant that he needed two "30/30" for other people and asked, "You know where them at?" Appellant asked if Maddox was talking about "shezells", and directed Maddox to someone on 80th Street. Officer Hartman testified that "shezells" is gang slang for shells.

On July 8, Maddox told appellant that he needed "a little tool" for a "little young gonnes." Appellant said that he was thinking. Officer Hartman testified that "tool" meant weapon or firearm and "gonnes" could refer to gang members.

Also in the July 8 conversation, appellant said that he had purchased 10 or 15 "8 ball shells" but had just given "that little nigga that for that." Maddox said, "I need

---

[3] Appellant had multiple tattoos on his arms, chest, back and shoulders that contained gang references, including "Hoover", "H74ver", and "S F H."

something right now." Officer Hartman testified that "8 ball shells" referred to either .38 or .380 shells.

On July 9, appellant stated that "Big Man" had called him about getting a "teezol" and that some people were trying to sell him something but he thought they had lost their mind. He said that it cost "6 dollars" but was "fresh out of the b-zox." Maddox asked if it was an "HK" or something like that. Appellant replied that he did not know. Maddox said that it would be well worth it if it was, and told appellant to find out. Officer Hartman testified that "teezol" meant gun, "HK" was a brand of handgun, and "fresh out of the b-zox" meant brand new.

Also during the July 9 conversation, appellant and Maddox discussed the fact that a rival gang member had entered the Hoover gang's territory and been beaten. Apparently, more rival gang members were in the Hoover gang's territory, and the gang wanted to inflict great bodily injury on them. Maddox was seeking weapons for this purpose. Appellant said that he was trying to get some shells for his weapon from his cousin, and Maddox indicated that he would try to get the shells for appellant. Later, Maddox said, "We ain't playing our part." Appellant replied, "Yeah man, if you can get some [shells], let me know man, what's happening or whatever." Appellant later added, "I ain't doing no good. I mean, I got, you know, my little personal thing or whatever; but I ain't got no shells up in that motherfucker."

Based upon a hypothetical assuming as facts that on several occasions a gang member had a handgun and a shotgun in his residence and had discussed with a prominent gang member where to obtain guns and ammunition, Officer Hartman opined that the gang member possessed the two weapons for the benefit of the gang because the handgun was available to be given to young gang members to be used in committing gang crimes. He also opined that the shotgun could be modified and used in gang crimes. Officer Hartman further opined that the gun-possessing gang member was the gang's gun guy, the person who supplied guns or ammunition or information about where to get them. Even if the particular two guns found in the residence were for the gang member's own use, they would provide protection for him while dealing in weapons on the gang's

behalf. Thus, those two guns would be possessed to promote, further and assist criminal conduct by gang members. Officer Hartman opined that even an unloaded shotgun or handgun was better than no weapon.

The only witness for the defense was a DNA expert who attempted to cast doubt on the findings of the prosecutions' DNA expert.

Discussion

1. Sufficiency of the evidence – gang enhancements

Appellant contends that there is insufficient evidence to support the jury's true findings on the gang allegations. We do not agree.

"'In reviewing a challenge to the sufficiency of the evidence, we do not determine the facts ourselves. Rather, we "examine the whole record in the light most favorable to the judgment to determine whether it discloses substantial evidence—evidence that is reasonable, credible and of solid value—such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt." [Citations.] We presume in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence. [Citation.] [¶] The same standard of review applies to cases in which the prosecution relies primarily on circumstantial evidence and to special circumstance allegations. [Citation.] "[I]f the circumstances reasonably justify the jury's findings, the judgment may not be reversed simply because the circumstances might also reasonably be reconciled with a contrary finding." [Citation.] We do not reweigh evidence or reevaluate a witness's credibility. [Citation.]'" (*People v. Nelson* (2011) 51 Cal.4th 198, 210.)

Appellant contends that the prosecutor's theory of the case was that appellant was the gang's "go-to" person for obtaining weapons and ammunition, but that the evidence showed only that he was a slacker who talked a good line about getting guns and

ammunition, but did nothing about it.[4] Even assuming for the sake of argument that the prosecutor did not show that appellant was the gang's primary procurer of weapons and ammunition, that failure would not require reversal of the gang enhancements.

Appellant was charged with two counts of being a felon in possession of a firearm, and it was these two crimes that were alleged to have been committed for the benefit of a criminal street gang. There is no dispute that appellant actually possessed these firearms, and was guilty of the underlying charges. In order to sustain the gang allegations, there need only be evidence that appellant possessed the firearms "for the benefit of, at the direction of, or in association with any criminal street gang, with the intent to promote, further, or assist in any criminal conduct by gang members." (§ 186.22, subd. (b)(1).)

There is substantial evidence to support such a finding. The contents of a July 9 conversation between appellant and Maddox show that appellant intended to use his firearms to help the gang. The two men discussed the fact that a rival gang member had entered the Hoover gang's territory and been beaten. Apparently, more rival gang members were in the Hoover gang's territory, and the gang wanted to inflict great bodily injury on them. Maddox was seeking weapons for this purpose. Appellant said that he was trying to get some shells for his weapon from his cousin, and Maddox indicated that he would try to get the shells for appellant. Later, Maddox said, "We ain't playing our part." Appellant replied, "Yeah man, if you can get some [shells], let me know man, what's happening or whatever." Appellant later added, "I ain't doing no good. I mean, I

---

[4] We note that appellant's attack on the sufficiency of the evidence to show that he was the "go-to" guy focuses on the fact that there was no direct evidence that he actually procured weapons for his fellow gang members. Success during the brief period covered by the calls was not necessary. The mere fact that Maddox called him repeatedly for assistance in obtaining weapons and ammunitions shows that Maddox believed that appellant could so assist him. Appellant certainly did not seem surprised by the request, and indicated that he was trying to find someone with the requested items. Appellant had clearly been shown weapons for sale. He also knew where a gun salesman kept his stash and indicated that the salesman needed transportation. Further, the intercepted conversations suggest that appellant and Maddox had other conversations that were not intercepted, perhaps because they were conducted on other telephones, or in person.

got, you know, my little personal thing or whatever; but I ain't got no shells up in that motherfucker." It is more than reasonable to understand this conversation as showing an intent by appellant to use one of his firearms to assist or promote criminal conduct by the gang, at the direction of the gang's leader, and for the gang's benefit. It is equally reasonable to infer that he would use either firearm for such a purpose, depending on what kind of ammunition he could acquire. There is no legal requirement that he actually have *used* the firearms to benefit the gang.

This essentially was the prosecutor's alternate theory at trial: that appellant would use the two guns himself. The expert witness opined that a gang member would possess personal weapons for the benefit of or at the direction of his gang if he intended to use the weapons to protect himself (while involved in gang activities) or gang property from attacks by rival gang members. The same would be true if the gang member intended to use his personal weapons to assist other gang members to defend themselves from attacks by rival gang member or to carry out gang activities.

To the extent that appellant contends that the expert testimony in this case was flawed because it simply informed the jury of how he felt the case should be resolved, appellant is mistaken.

The primary value of expert testimony in this case was to explain the meaning of gang slang or code, and to provide facts about events which related to the conversations. Among other things, that testimony explained that parts of the conversations referred to the need to defend against rival gang members entering the territory of appellant's and Maddox's gang and also to arming young gang members so that they could undertake activities to support the gang. This testimony did not involve the expert's opinion on how the case should be resolved.

The gang expert did offer some opinion testimony, but it was not improper. "A gang expert may render an opinion that facts assumed to be true in a hypothetical question present a 'classic' example of gang-related activity, so long as the hypothetical is rooted in facts shown by the evidence." (*People v. Gonzalez* (2005) 126 Cal.App.4th 1539, 1551, fn. 4.) Here, Officer Hartman explained how particular criminal conduct

could benefit the Hoover gang. This was permissible. (*People v. Gardeley* (1996) 14 Cal.4th 605, 623.) To the extent that appellant relies on *People v. Killebrew* (2002) 103 Cal.App.4th 644 to support his argument, that reliance is misplaced. As the California Supreme Court has explained, "Obviously, there is a difference between testifying about specific persons and about hypothetical persons. It would be incorrect to read *Killebrew* as barring the questioning of expert witnesses through the use of hypothetical questions regarding hypothetical persons." (*People v. Gonzalez* (2006) 38 Cal.4th 932, 946, fn. 3.) That is what Officer Hartman did here.

2. CALCRIM No. 1401

Appellant contends that the trial court erred in refusing to modify CALCRIM No. 1401 concerning the gang allegations.

The instruction provides, in pertinent part: "You must decide whether the People have proved this [gang] allegation for each such crime and return a separate finding for each such crime. [¶] To prove this allegation, the People must prove that: [¶] 1. The defendant committed the crime for the benefit of, at the direction of, or in association with a criminal street gang; [¶] AND [¶] 2. The defendant intended to assist, further, or promote criminal conduct by gang members." The instruction then defines the terms "criminal street gang" and "pattern of criminal gang activity." The instruction concludes by telling the jury: "The People need not prove that the defendant is an active or current member of the alleged criminal street gang. [¶] . . . [¶] The People have the burden of proving each allegation beyond a reasonable doubt. If the People have not met this burden, you must find that the allegation has not been proved."

Appellant proposed adding the following two paragraphs to the end of CALCRIM No. 1401: "You may not find that the allegations have been proved based solely upon the opinion of an expert witness, even if that opinion is coupled with evidence of defendant's membership in an alleged criminal street gang. In addition, there must exist substantial evidence that the defendant committed the crimes (for the benefit of, at the direction of or in association with) a criminal street gang; [¶] Substantial evidence is evidence that is

reasonable, credible and of solid value – such that a reasonable juror could find the defendant guilty beyond a reasonable doubt." He contended that the modification was based on language in *People v. Ochoa* (2009) 179 Cal.App.4th 650.

The trial court denied appellant's request. The court pointed out that the "substantial evidence" language dealt with the sufficiency of the evidence on appeal, was not the standard of proof for the jury and changed the definition of reasonable doubt. The court also stated that instructions which tell the jury that certain evidence is insufficient to support a verdict are not normally given. The court noted that the jury would be receiving standard instructions defining reasonable doubt and explaining consideration of an expert opinion.

Generally, a trial court may refuse to give an instruction "if it is an incorrect statement of law, is argumentative, or is duplicative." (*People v. Gurule* (2002) 28 Cal.4th 557, 659.)

Here, the part of the instruction referring to substantial evidence was an incorrect statement of the law, and was potentially confusing as well. Substantial evidence is a standard which applies to review of jury verdicts. The jury itself is required to use the beyond a reasonable doubt standard. The jury was correctly instructed on this standard.

The part of the instruction stating that an expert's opinion coupled with gang membership was insufficient to support a true finding was argumentative. In every case, it is possible for a defendant to argue that certain evidence should not be believed or understood in the way the prosecution contends, and that without that evidence, there is insufficient evidence to find the defendant guilty. Appellant has not cited, and we are not aware of any case, including *Ochoa, supra,* which holds that a defendant is entitled to a jury instruction which makes this argument for him.

As the trial court pointed out to appellant, if in fact the only evidence to support the finding was the expert witness testimony and appellant's gang membership, and that evidence is insufficient under *Ochoa, supra,* that situation should be addressed by a section 1118 motion, not a jury instruction. As we discuss in section 1, *ante*, there was

other evidence, namely, the intercepted telephone conversations between appellant and Maddox.

As the trial court also pointed out, the instruction was duplicative of other instructions, specifically, those on reasonable doubt, consideration of an expert's opinion and the gang allegation. Since the instruction was incorrect, argumentative and duplicative, the trial court did not abuse its discretion in refusing to give the instruction.

3. Section 654

Appellant contends that section 654 precluded consecutive sentencing on counts 1 and 2. As the parties acknowledged in their initial briefing, this issue was pending before the California Supreme Court. During the pendency of this appeal, the California Supreme Court decided *People v. Correa* (June 21, 2012, S163273) 54 Cal.4th 331. The holding of this case is dispositive of appellant's claim. Under *Correa*, consecutive sentencing is permitted.

The defendant in *Correa, supra*, was found hiding in a closet with a cache of guns and was subsequently convicted of seven counts of being a felon in possession of a firearm. He was sentenced consecutively for each count. The Supreme Court held that section 654 does not bar multiple punishment for multiple violations of the same criminal statute, but also held that this rule would only apply prospectively because the law had been unsettled in this area. (54 Cal.4th at p. 344.) As relevant to this case, the Supreme Court also held that former section 12001, subdivision (k) makes possession of each weapon a separate offense.[5] Section 12001, subdivision (k) provides: "For purposes of Section 12021, . . . notwithstanding the fact that the term 'any firearm' may be used in those sections, each firearm . . . shall constitute a distinct and separate offense under those sections."

[5] This subdivision is now section 23510. It was not changed substantively in being renumbered.

Here, the trial court was aware that its ability to impose consecutive sentences was at issue. The prosecution argued in its sentencing memorandum that section 12021, subdivision (k), exempted section 12021 from the provisions of section 654, and mentioned *Correa*, *supra*, in the memorandum.[6] Accordingly, the trial court did not err in sentencing appellant consecutively.

4. Motions to quash the search warrant and to suppress evidence

Appellant contends the trial court erred in denying his motions to quash and/or traverse the search warrant and suppress evidence, which were based on claimed violations of the wiretap statute. We do not agree.

Appellant's motion to suppress the search warrant was for all intents and purposes a motion to suppress the contents of the intercepted wire communication. Absent those communications, there would be no probable cause for a search warrant.

Section 629.72 provides that any person may move to suppress some or all of the contents of any intercepted wire communication or evidence derived therefrom "only on the basis that the contents or evidence were obtained in violation of the Fourth Amendment of the United States Constitution or of this chapter. The motion shall be made, determined, and be subject to review in accordance with the procedures set forth in Section 1538.5."

"'In ruling on a motion to suppress, the trial court must find the historical facts, select the rule of law, and apply it to the facts in order to determine whether the law as applied has been violated. [Citation.] We review the court's resolution of the factual inquiry under the deferential substantial evidence standard. The ruling on whether the applicable law applies to the facts is a mixed question of law and fact that is subject to independent review. [Citation.]' [Citation.]" (*People v. Brendlin* (2008) 45 Cal.4th 262, 268.) Generally, "[i]n evaluating whether the fruits of a search or seizure should have been suppressed, we consider only the Fourth Amendment's prohibition on unreasonable

---

[6] Respondent also made this argument on appeal.

searches and seizures. [Citation.]" (*Id*. at p. 268.) When the motion involves communications intercepted pursuant to a wiretap order, evidence may also be suppressed on the ground that provisions of the wiretap statute were violated, even if the Fourth Amendment has not been violated. (*People v. Jackson* (2005) 129 Cal.App.4th 129, 148-149.)

a. Relevant provisions of the wiretap law

The wiretap statute specifies that a wiretap application may be approved by the presiding judge of the superior court or one other judge designated by the presiding judge. (§ 629.50, subd. (a).)[7] At the relevant times in this case, this judge was Judge Fidler, and it was he who approved the wiretap application and extension and signed the wiretap order at issue in this case.

The wiretap statute specifies that the wiretap orders and applications be sealed by the judge. (§ 629.66.) At the time of appellant's case, section 629.66 provided that the applications and orders "be disclosed only upon a showing of good cause before a judge." (*Ibid*.) The applications and orders must be kept for 10 years. (*Ibid*.) Thus, sealed wiretap applications and orders are the norm.

"Custody of the applications and orders shall be where the judge orders." (§ 629.66.) In this case, Judge Fidler ordered that the application and order be kept at police headquarters. There is nothing in the record to suggest that this was an unusual occurrence.

Wiretap orders may only be issued if there is probable cause to believe that an individual is committing, has committed, or is about to commit four categories of crimes. As is relevant in this case, one such category is "[a]ny felony violation of Section

---

[7] In 2010, this section was amended to permit the presiding judge to authorize an ordered list of judges to approve wiretap orders. A judge on this list may hear an application for a wiretap only upon a finding that the presiding judge, first designated judge and those judges higher on the list (if any) are unavailable. (§ 629.50, subd. (a).)

186.22." (§ 629.52, subd. (a)(3).) The qualifying crime or crimes must be specified in the order.

When a communication intercepted pursuant to a wiretap order involves a type of crime not specified in the order (hereafter "non-target crime"), certain conditions must be met before that information can be acted upon. As relevant to argument in this case, evidence of non-target crimes may be used to the same extent as target crimes if two conditions are met: (1) the non-target crime is a crime specified in section 629.52 or 667.5 and (2) the use is "authorized by a judge if the judge finds, upon subsequent application, that the contents were otherwise intercepted in accordance with the provisions of this chapter." (§ 629.82, subd. (a).)

A defendant is entitled to notice that he was identified as the result of a communication intercepted under the wiretap statute. As relevant in this case, appellant was entitled to such notice at least 10 days before his preliminary hearing. (§ 629.70, subd. (a).) Appellant received such notice on August 12, twenty-two days before the preliminary hearing.

The wiretap statute also requires the prosecution to provide the defendant with copies of the wiretap application and order and monitoring logs, and with a transcript of the intercepted communications. As relevant in this case, such disclosure was required no later than 10 days before the preliminary hearing. (§ 629.70, subds. (b) & (c).) Unless the specified material is disclosed 10 days before a hearing, the contents of the intercepts and any evidence derived may not be received into evidence at the hearing. (§ 629.70, subd. (c).) This requirement is not absolute, however. The wiretap statute permits a judge to limit disclosure of the specified documents for good cause. (§ 629.70, subd. (d).)

b. Procedural background

The search warrants in this case were based on intercepted phone calls between appellant and Kevin Maddox, a fellow gang member whom law enforcement officers described as the president of the gang, together with some expert opinion explaining

slang terms. As we discuss, *ante*, the calls were intercepted pursuant to a wiretap order which targeted Maddox.

There were two search warrants for appellant's residence. The search warrants and supporting affidavits were initially sealed. The first was signed on July 24, 2008, by Judge Fidler. Seventeen other search warrants were also issued. The officers responsible for serving the warrant on appellant's residence were concerned that the address was not accurate, and did not immediately execute the warrant. Detective Jenks then ascertained that the address was accurate. A new search warrant was obtained on July 29 from Judge Feuer. The confidential affidavit explained that there was a previous search warrant signed by Judge Fidler for appellant's residence, but it was not served because there was some uncertainty about the address. The affidavit summarized the intercepted calls between appellant and Maddox, and explained that Judge Fidler had signed the wiretap order in the case. It was Judge Feuer's warrant which was actually executed.[8]

c. First motion to suppress

On September 8, 2008, a week before the preliminary hearing, appellant filed a motion pursuant to section 1538.5 to suppress evidence seized pursuant to a search warrant, to unseal the sealed portion of the search warrant and to quash or traverse the search warrant. At this point, portions of the search warrant and affidavit were sealed. Thus, the motion alleged generally that there was no probable cause to support the issuance of the search warrant and that there were material misrepresentations in the affidavit filed in support of the search warrant. Counsel's declaration in support of the motion also stated that he was "informed and believes that wiretap was used, potentially illegally, to obtain evidence in this case." The motion sought a review of the sealed

[8] The parties initially appear to have misread the signature on the second search warrant as being Judge Fidler's signature, because Judge Feuer's signature was difficult to read and also perhaps because Judge Fidler's signature was the one they expected to see. They eventually realized their mistake. However, the parties continued to accidentally confuse the judges' names when discussing the warrants throughout the proceedings.

portions of the search warrant and affidavit pursuant to *People v. Hobbs* (1994) 7 Cal.4th 948.

At the hearing on the motion, which began on September 15, appellant's counsel argued that the evidence should be suppressed because the prosecutor had not fully complied with section 629.70 of the wiretap statute concerning disclosure, and that this failure required dismissal of the case. Appellant contended that the non-compliance was not subject to any form of harmless error analysis.

The prosecutor had provided appellant with notice that his calls had been intercepted, and with recordings of the calls on August 12, twenty-two days before the preliminary hearing, which satisfied some of the disclosure requirements of section 629.70. At the same time, the prosecutor informed appellant's counsel that he would not be providing appellant with copies of the wiretap application and order, as required by subdivisions (b) and (c) of section 629.70. The prosecutor stated that these documents were sealed by the court which issued the wiretap order.

At the hearing, the prosecutor maintained that the order and application could not be disclosed because they were sealed. Appellant's counsel argued that the wiretap application and order should then be subject to a *Hobbs* review to determine if they were proper. The hearing was continued.

On September 16, the trial court found the prosecutor had not complied fully with section 629.70, the non-compliance was subject to a form of harmless error analysis, and the non-compliance was harmless. Appellant contends that the trial court erred in finding that the non-compliance was subject to a harmless error analysis. We see no error in the trial court's ruling.

Appellant acknowledges that the prosecutor could not simply ignore Judge Fidler's sealing order and turn over the wiretap application and order. His complaint seems to be that the prosecutor did not take affirmative steps to comply with section 629.70 ten days before the preliminary hearing. Although appellant does not specify the precise steps he believes the prosecutor should have taken, under the law in effect at the time of appellant's motion, the prosecutor could have moved for an order limiting disclosure

pursuant to section 629.70, subdivision (d), moved to have the wiretap order and application unsealed pursuant to section 629.66 if good cause existed or requested a *Hobbs* review from the judge.

The unsealing provisions of section 629.66 have changed since the time of appellant's case and the duties of the prosecutor are clearer under this amendment.[9] We will assume for the sake of argument that at the time of appellant's case, the prosecutor had a duty to undertake one of the three above described courses of action. The prosecutor did none of those things. The trial court found the prosecutor's inaction to be harmless. We agree.

Appellant contends that the trial court was without legal authority to make this determination because section 629.70 violations are not subject to harmless error analysis. His argument is based on subdivision (c) of that section. Subdivision (c) provides that the 10 day disclosure period may be waived by the judge *with respect to the transcript* if the judge finds that the defendant will not be prejudiced by the delay. Appellant points out that there is no similar provision for waiving the time period for disclosure of the wiretap application and order if the defendant will not be prejudiced by the delay. From this, he concludes that late disclosure of those documents cannot be assessed for prejudice. We do not agree.

As we discuss, *ante*, section 629.70 contains a provision which permits the court to limit disclosure of any relevant document upon "a showing of good cause." (§ 629.70, subd. (d).) Thus, the section recognizes that in some cases, there will be no disclosure to the defendant, timely or otherwise, of all or part of the wiretap-related documents. If a

---

[9] The Legislature amended section 629.66 in 2010 to permit disclosure of sealed applications and orders "upon a showing of good cause before a judge or for compliance with the provisions of subdivisions (b) and (c) of Section 629.70." (Stats. 2010, ch. 707 (S.B. 1428) § 11.) Thus, disclosure of the sealed wiretap order and application for section 629.70 purposes is now the norm, and does not require a court order unsealing those documents. The prosecutor must disclose the wiretap order and application or seek an order limiting disclosure under section 269.70, subdivision (d). This amendment was not in effect at the time of appellant's case, however.

defendant can be expected to proceed without some wiretap documents in some situations, he can equally be expected to proceed with late disclosure of some wiretap documents in some situations.

More generally, we agree with our colleagues in Division Seven of this District Court of Appeal that violations of the provisions of the wiretap statute are subject to review for harmless error. (*People v. Jackson, supra,* 129 Cal.App.4th at pp. 151-152.) There is nothing to suggest that "our Legislature intended evidence to be suppressed whenever law enforcement fails to comply precisely with any of the wiretap procedures established by state law." (*Id*. at p. 151.)

We also agree with the harmless error analysis set forth in *Jackson, supra*. Under that analysis, "evidence gained through a wiretap should be excluded under sections 629.72 and 1538.5 when the defendant has established the evidence was obtained in violation of the Fourth Amendment of the United States Constitution or the provisions of . . . sections 629.50 through 629.98[], the statutory provision violated was intended to play a central role in the authorization and execution of wiretaps and the People have failed to establish the statutory purpose was achieved in spite of the error." (*People v. Jackson, supra,* 129 Cal.App.4th at p. 160.)

Here, we find that timely disclosure of wiretap documents is intended to play a central role in the execution of wiretaps, specifically to permit defense counsel to assess whether the wiretap order was properly obtained and executed, and to prepare a motion to suppress evidence if appropriate. We find that the statutory purpose of the statute was achieved in spite of the error.

The prosecutor informed appellant that he did not intend to disclose the wiretap order and application because they had been sealed by Judge Fidler. Regardless of who initiated the proceeding, under the law in effect at the time of appellant's preliminary hearing, some form of judicial review of the wiretap application and order was necessary to determine if those documents should remain sealed or be disclosed. Once the trial court in this case became aware that the order and applications were sealed, the court reviewed the wiretap order and related documents and determined that good cause still

existed for the bulk of the information in the documents to remain sealed. This was clearly permissible under section 629.70, subdivision (d). The result would have been no different if the prosecutor had requested such a ruling 10 days before the hearing. The court dealt with the delay by offering appellant a continuance, but appellant declined. Thus, there was no harm to appellant from the prosecutor's inaction.

At the hearing on his first motion to suppress, appellant's counsel also argued that section 629.82 of the wiretap statute provided that intercepts could only be used against a person who was not a target of the wiretap if the offense was a violent felony, which firearm possession is not. At this point, the wiretap order had not yet been reviewed by the court, and the court expressly stated it could not rule on any argument other than the section 629.70 argument.

Appellant's counsel also stated that he still wanted a *Hobbs* review of the wiretap application and order. The court stated, "[T]he Court is going to need to have a redacted and unredacted copy filed with the Court under seal. I am going to review them over the break – over the – in the evening. And then, hopefully, we will be ready to do the in camera tomorrow." Detective Jenkins present in court; prosecutor represented that he had the unredacted wiretap documents with him and would file them under seal at that time.

The trial court conducted a *Hobbs* review of the search warrant and supporting affidavit and wiretap order and application. It appears that a hearing on the matter took place in camera on the morning of September 17. The court ordered portions of these documents unsealed, but determined that most of the contents should remain sealed.

At the beginning of the afternoon hearing on September 17, the court stated, "I must say, after reviewing all these materials last night and again this morning, the Court really is – concerned about the fact that these were all turned over yesterday afternoon to the defense." Although the court was concerned about the late disclosure of these documents, the court ultimately stated that it was not going to reverse its previous ruling. At that point the preliminary hearing began. The charges at issue in the preliminary hearing were two counts of possession of a firearm by a felon, with allegations that the

possession of the firearms was for the benefit of a criminal street gang within the meaning of section 186.22. After brief testimony, the hearing was continued.

On September 18, counsel told the court that the People were stipulating that the sole information used to obtain the search warrant was the 11-page search warrant declaration. Appellant's counsel then argued again that section 629.82 required a finding by a judge that the information in the intercepted calls related to a third party was obtained in a manner consistent with the purposes of the wiretap. Appellant concluded that since the wiretap documents were not included in the application for the search warrant, Judge Feuer, who signed the warrant, could not have determined that the intercepted calls were obtained in a manner consistent with the wiretap. Counsel believed that only Judge Fidler, who had issued the wiretap order and therefore had independent knowledge of the wiretap's purpose, could have properly signed the search warrant (given that the warrant did not contain the wiretap documents). The court stated that section 629.82 only applied if the crime uncovered was not a crime specified in section 629.52. Among the crimes listed in section 629.52 is "any felony violation of

section 186.22." (§ 629.52, subd. (a)(3).)[10] At that point, argument was suspended so that preliminary hearing testimony could proceed.

Appellant contends that the trial court erred in finding that section 629.82 was not applicable. He contends that the section applies whenever the intercepted

---

[10] At one point, appellant also argued that possession of firearms with a gang enhancement was not a crime covered by section 629.52, subdivision (a). The trial court did not agree. The trial court was correct.

Section 629.52, subdivision (a) lists as a covered crime "[a]ny felony violation of section 186.22." Appellant contends that this can only be a reference to section 186.22, subdivision (a), because that subdivision contains the only stand-alone crime in section 186.22. The remainder of section 186.22 covers enhancements to felonies, when those felonies are committed for a gang-related purpose. Appellant also contends that it must be a reference to section 186.22, subdivision (a) because that is the only subdivision which requires that the defendant be an active participant in a criminal gang.

We do not agree that section 629.52 is referring only to subdivision (a) of section 186.22. There is nothing in the plain language of the section which so limits it.

Appellant points out that wiretaps are limited to very serious offenses, and believes that this fact supports his contention that only subdivision (a) of section 186.22 is covered. Judging by the punishment imposed, a violation of subdivision (a) is the least serious, not the most serious, violation of section 186.22. Subdivision (a) is a wobbler with a felony term of 16 months or two or three years. The enhancements imposed under section 186.22, subdivision (b) have a minimum term of two, three or four years, and in a number of situations have much higher terms.

Appellant contends that subdivision (a) requires active participation in a criminal street gang, while subdivision (b) can include passive conduct. He claims that this distinction also shows that only subdivision (a) falls under the wiretap statute.

Subdivision (a) "criminalizes active participation in a criminal street gang by a person who has the requisite knowledge and who 'willfully promotes, furthers, or assists in *any* felonious criminal conduct by members of that gang.' (§ 186.22(a), italics added.) The plain language of the statute targets felonious criminal conduct, not felonious gang-related conduct." (*People v. Albillar* (2010) 51 Cal.4th 47, 55.)

Proposition 21, which added "[a]ny felony violation of section 186.22" to the wiretap statute, was concerned with gang-related crime. That proposition states in part: "(b) Criminal street gangs and gang-related violence pose a significant threat to public safety and the health of many of our communities. Criminal street gangs have become more violent, bolder, and better organized in recent years." It also states, "(h) Gang-related crimes pose a unique threat to the public because of gang members' organization and solidarity." Thus, there is no reason to believe that the voters intended to exclude subdivision (b), which clearly targets gang-related crime, and include only subdivision (a) which does not target gang-related felonious conduct.

communications involve a person who is not named in the wiretap order. The court was correct that the section did not apply, although the court's reasoning was mistaken.

Section 629.82 is entitled "Interceptions relating to crimes not specified in order of authorization; use." All three subdivisions of section 629.82 use the phrase "communications relating to crimes other than those specified in the order of authorization." Section 629.82 makes no mention of communications involving persons other than the person specified in the order (hereafter the "target person"), or of crimes committed by persons other than the target person. The focus of this section is on the nature of the crime, not the identity of the criminals.

Section 629.82 provides that communications relating to crimes other than those specified in the order of authorization (hereafter "non-target crimes") may be used if two conditions are met: (1) the non-target crime is a crime specified in section 629.52 or 667.5 and (2) the use is "authorized by a judge if the judge finds, upon subsequent application, that the contents were otherwise intercepted in accordance with the provisions of this chapter." (§ 629.82, subd. (a).)

"Simply stated, targeted interceptions are those communications specified in the wiretap authorization order under section 629.54, subdivision (c). The state is not required to obtain judicial approval before it may use targeted interceptions in any criminal court or grand jury proceeding. However, the state must obtain judicial approval before it may use nontargeted, statutorily authorized interceptions or certain enumerated crimes in criminal court or grand jury proceedings. (§§ 629.82, subd. (a), 629.78.)" (*People v. Roberts* (2010) 184 Cal.App.4th 1149, 1177.)

It is not clear from the record before this Court whether appellant's trial counsel saw any version of the wiretap order. This Court has reviewed the wiretap application, order and applicable extension. Among the target crimes listed in the order are "felonies (including but not limited to narcotics trafficking in violation of Health and Safety Code sections 11352 and 11351) for the benefit of, at the direction of, or in association with a criminal street gang with the intent to promote, further, or assist any criminal conduct by gang members in violation of section 186.22(b)." The affidavit in support of the search

warrant in this case stated that intercepted calls showed that appellant was obtaining guns and ammunition at Maddox's request for use by the Hoover gang. Thus, on its face, the search warrant is using communications involving a target crime, the supply of weapons for gang purposes. Section 629.82 did not apply.

At the close of the preliminary hearing testimony, appellant's counsel argued that the evidence failed to show that appellant possessed the firearms for the benefit of a gang. The court found that there was sufficient evidence to show that the firearms were possessed for the benefit of and in association with a criminal street gang.

The court then heard further brief argument on the motion to suppress. Appellant's counsel stated, "I don't think the search warrant of my client was properly obtained; therefore I think it should be quashed. And I'll submit on two grounds. One, again, that it's a case that is insufficient for the gang allegation to prevail. Secondly, that law enforcement did not follow the strict procedures under the wire tap statute. [¶] Submitted."

The court ruled: "[T]his current search warrant, signed by Judge Fidler, had ample probable cause in it. And you only have to back up from that to proceed whether the wire tap applications also have probable cause. [¶] The Court has reviewed this and I would conclude there is ample, probable cause. Parts of those were disclosed to the defense or there were still certain portions that were not disclosed. But it does not appear to me, that there was any reasonable probability that the defense could prevail on a motion to quash those search warrants because there is more than sufficient probable cause. There is probable cause from multiple sources and pieces of information."

Appellant contends that when the trial court made its final ruling on his motion to suppress at the end of the preliminary hearing, the trial court had only performed the first part of the *Hobbs* review, to determine whether confidentiality was still required and never actually reviewed the substance of the sealed documents to determine if the wiretap order had been properly granted and the search warrant properly issued.

We understand the trial court's comments, quoted, *ante*, as stating that it had reviewed the wiretap documents substantively. The court referred to backing up from the

search warrant to consider "whether the wire tap applications also have probable cause. [¶] The Court has reviewed this and I would conclude there is ample, probable cause."

On its face, the trial court's ruling complies with the procedure in *People v. Hobbs, supra,* 7 Cal.4th 948. Under *Hobbs*, if the court finds that the relevant documents have been properly sealed and the defendant has moved to traverse the warrant, the court "should then proceed to determine whether the defendant's general allegations of material misrepresentations or omissions are supported by the public and sealed portions of the search warrant affidavit." If the trial court determines that the defendant's general allegations are unsupported, "the court should simply report this conclusion to the defendant and enter an order denying the motion to traverse." (*People v. Hobbs*, *supra*, 7 Cal.4th at p. 974.)

It appears, however, that the trial court did not fully comply with *Hobbs, supra*. The court in *Hobbs* expressly stated: "In all instances, a sealed transcript of the in camera proceedings, and any other sealed or excised materials, should be retained in the record along with the public portions of the search warrant application for possible review. [Citations]." (*People v. Hobbs, supra,* 7 Cal.4th at p. 975.) Only a partial transcript, relating to the need for continued confidentiality, is found in the record. There is no record of the trial court's substantive review of the documents, which may have occurred at home. Extensive record corrections proceedings have shown only that the judge involved no longer has an independent memory of his review.

From the trial court's remarks in court, quoted above, it appears that appellant is correct that the court did not consider appellant's claim that the warrant was not valid because wiretap procedures were not followed. This was a separate claim from appellant's claim that the warrant was not valid because the wiretap order lacked probable cause.

The trial court appeared to believe that review of wiretap procedures was required only if the intercepted communications fell under section 629.82. As we discuss, the intercepts in this case did not fall under section 629.82. Thus, the trial court was correct that section 629.82 did not apply and review was not required under that section. Section

629.82 however simply mandates a review of wiretap procedures before intercepts involving non-target crimes may be used. Nothing in section 629.82 precludes a defendant from making a motion to suppress under section 629.72 on the ground that an intercept was obtained in violation of the wiretap order. Such motions are governed by the same rules and procedures as motions to suppress under section 1538.5.

We cannot fault the trial court for failing to consider this claim, however, as appellant did not clearly raise it in the trial court. Appellant's trial counsel never made this distinction between the mandatory review of procedures required under section 629.82 for the use of non-target crimes and the possibility of review of procedures for target crimes under section 629.72 as part of a motion to suppress. We recognize that appellant's counsel was working under somewhat of a handicap, as the wiretap application and order were sealed throughout proceedings in the trial court. We will assume for the sake of argument that appellant has not forfeited this claim.[11]

On appeal, appellant's counsel suggests that as part of considering the motion to suppress, the trial court should have reviewed wiretap documents to determine that calls were properly minimized and that required reports were properly prepared and submitted.

Since appellant's three calls involved target crimes and did not involve privileged communications, law enforcement did not have a duty to minimize those calls. We will assume for the sake of argument that there were other intercepted calls between appellant and Maddox which did not involve target crimes and which law enforcement improperly failed to minimize. The prosecutor was not seeking to use those calls against appellant, and they would not have been the proper subject of a motion to suppress evidence.

---

[11] Appellant did make a general statement that the wiretap procedures were not followed, which is similar to the general material misrepresentation claim permitted by *People v. Hobbs, supra,* 7 Cal.4th 948 in cases where search warrants are sealed. Under the reasoning of *Hobbs*, this statement would appear to be enough to create a duty on the part of the reviewing court to look for such procedural violations. Appellant never made it clear that he believed that review was required by *Hobbs*, however. His arguments focused on review being required by section 629.82.

Similarly, appellant lacked standing to challenge any of Maddox's calls in which he was not a participant and which were not offered against him.

The wiretap statute provides that reports shall be made to the judge who issued the wiretap order "setting forth what progress has been made toward achievement of the authorized objective, or a satisfactory explanation for its lack, and the need for continued interception." (§ 629.60.) At the time of appellant's case, these reports were required for each six-day period that the wiretap order was in effect.[12] (§ 629.60.) If the judge finds that there is not satisfactory progress or a satisfactory explanation for the lack of progress or a satisfactory explanation for the need for continued interception, the judge terminates the wiretap order. (§ 629.69.)

Even assuming for the sake of argument that these reports were not prepared in a timely manner, or were not satisfactory, appellant was not affected by any such omissions. The first intercepted call in this case took place on June 10, 2008, four days after the June 6, 2008 date of wiretap order No. 08-117, and before any report would have been due. Further, Judge Fidler signed an extension of the wiretap order on July 3, 2008, showing that he had found a need for the wiretap to continue. The other two calls took place on July 8 and 9, 2008. These calls were intercepted five and six days after the July 3, 2008 date of extension number 1 to wiretap order No. 08-117. The first call took place before any report was due, the second on the last day of the first reporting period. Thus, for all three calls, even if a timely and accurate report would have caused Judge Fidler to terminate the wiretap, that termination would have occurred after appellant's calls were intercepted.[13]

---

[12] Reports are now required for each 10-day period.

[13] The same would be true if law enforcement's complete failure to file a report would have resulted in termination of the wiretap order.

d. Subsequent motions

On November 26, 2008, appellant filed a motion to set aside the information pursuant to section 995. This motion essentially repeated the arguments that appellant had made in connection with the motion to suppress and at the hearing on that motion. Appellant contended that the prosecutor's failure to comply with the disclosure requirements of section 629.70 barred the use of the intercepted calls and the prosecutor's failure to comply with section 629.82 invalidated the warrant. Appellant further contended that there was insufficient evidence to support the gang allegations, and that absent evidence that appellant's crimes were gang-related, the search warrant was invalid.

At the January 9, 2009 hearing on this motion, the prosecutor replied in part to appellant's section 629.82 argument as follows: "That wire, which has already been challenged by [appellant's counsel], has in it a provision that we can use evidence about gang crimes in obtaining search warrants. [¶] And when that was presented to the magistrate who signed the search warrant, they accepted that, after reviewing the document, the four corners of that document." The prosecutor continued: "Now we have charged Mr. Gilliam with a gang crime, and he's trying to say, 'Look, it wasn't a gang crime, so we should go all the way back to the wire and challenge that, because these aren't crimes that were contained within the original scope of the wire.' [¶] That's simply not true. The activity that's in the search warrant that's described there is completely authorized by the original wire, and therefore the provisions under 629.82 that [appellant's counsel] brings up are not relevant."

Judge Shapiro, who heard the section 995 motion, declined to overturn the previous ruling by Judge Goldberg, made at the time of the preliminary hearing. Judge Shapiro stated, "I believe this case from the preliminary hearing is sufficient. 1538 was covered there. The proceedings concerning the wiretap were covered there. And it was in camera. And I believe that, as the case now stands, the 995 . . . [is] not well taken, and so the motion is denied."

Following this ruling, appellant obtained private counsel. Trial was delayed. On September 9, 2009, appellant's new counsel filed a second motion to suppress pursuant to

section 1538.5. This motion was aimed primarily at events which allegedly occurred after the issuance of the first search warrant by Judge Fidler but before the issuance of the second search warrant by Judge Feuer. The trial court ruled against appellant on those claims, and appellant does not challenge that ruling on appeal. Respondent states on appeal that appellant also contended that the warrant was invalid because the judge who issued the search warrant did not review the wiretap application. We do not see this contention at the pages cited by respondent. Such an argument would be repetitive of earlier arguments. The court did not rule specifically on this argument, but found that "search warrant two is justified." That would be the warrant signed by Judge Feuer.

The arguments made by appellant in these two motions were repetitive of arguments which he had made earlier and which had been previously rejected. For the same reasons that appellant's first motion was correctly denied, his subsequent motions were also correctly denied.

Disposition

The judgment is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

ARMSTRONG, J.

We concur:

TURNER, P. J.

MOSK, J.